Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
AT&T Corp.,	)	
	)	
Complainant,	)	Proceeding No. 17-56
	)	Bureau ID No. EB-17-MD-001
v.	)	
	)	
Iowa Network Services, Inc.,	)	
	)	
Defendant.	)	

REPLY OF IOWA NETWORK SERVICES, INC. TO AT&T CORP.'S OPPOSITION

Iowa Network Services, Inc., d/b/a Aureon Network Services ("Aureon"), by its undersigned attorneys, and pursuant to Section 1.106(h) of the FCC's rules, files this Reply to AT&T's Corp.'s ("AT&T) Opposition to Aureon's Petition for Reconsideration.

I. AS THE FCC DID NOT PROVIDE AUREON WITH PRIOR NOTICE THAT IT WAS THE ONLY COMPANY IN THE NATION REGULATED AS BOTH A DOMINANT CARRIER AND A NON-DOMINANT CARRIER, THE FCC'S *LIABILITY ORDER* CONTRAVENES THE CONSTITUTIONAL PROTECTIONS AGAINST GOVERNMENT ACTION DEPRIVING AUREON OF ITS PROPERTY WITHOUT DUE PROCESS.

In its Opposition, AT&T avers that the competitive local exchange carrier ("CLEC") rate transition rules adopted in the *2011 USF/ICC Transformation Order*[1] have applied to Aureon since they were promulgated, and contends that Aureon does not contest the Commission's finding in the *Liability Order*[2] that CLEC rate cap and rate parity rules applied to Aureon prior to

[1] *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) ("*2011 USF/ICC Transformation Order*").
[2] *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, Memorandum Opinion and Order, FCC 17-148, Proceeding No. 17-56, Bureau ID No. EB-17-MD-001 (rel. Nov. 8, 2017) ("*Liability Order*").

the *Liability Order*.[3] AT&T is wrong on both counts. Aureon certainly does contest that the CLEC rate cap and rate parity rules applied to Aureon prior to the *Liability Order* because prior to that decision, the FCC had never before classified or regulated Aureon as a CLEC, i.e., a non-dominant carrier.

The *2011 USF/ICC Transformation Order* adopted default transitional rates for LECs that were either ILECs (Section 51.909) or CLECs (Section 51.911), but prior to the *Liability Order*, Aureon was neither. Furthermore, the *Liability Order* stated that Aureon's tariff rate exceeded the Section 51.905(b) default transitional rate.[4] However, nowhere in Section 51.905(b) is there any mention of how to calculate the default transitional rate. Instead, Section 51.905(b) refers to the default transitional "rates specified by this subpart."[5] The specific rule in the "subpart" that calculates the default transitional rate is Section 51.911, which by its terms is only applicable to non-dominant CLECs. Furthermore, 51.905(b)(1) states that "LECs shall follow the procedures specified in part 61" when filing tariffs,[6] which Aureon did by calculating its dominant carrier tariff rate on the basis of cost studies required by Section 61.38. The *2011 USF/ICC Transformation Order* also adopted Section 51.905(c), which states that "[n]othing in this section shall be construed to require a carrier . . . to amend an existing tariff if it is not otherwise required to do so under applicable law."[7] As Aureon's dominant carrier tariff already fully complied with Section 61.38, the law applicable to dominant carriers like Aureon did not require Aureon to further amend its tariff.

[3] AT&T Opp. at 2.
[4] *Liability Order* at ¶¶ 23, 29.
[5] 47 C.F.R. § 51.905(b).
[6] 47 C.F.R. § 51.905(b)(1).
[7] 47 C.F.R. § 51.905(c).

In light of the foregoing, there is no merit to AT&T's accusation that Aureon has conflated the Commission's Part 51 rules with the Part 61 tariff rules.[8] The transitional access service pricing rule for CLECs in Section 51.911(c) explicitly cross-references Section 61.26. Section 61.26 is contained in Subpart C entitled "General Rules for Nondominant Carriers." As Aureon is a dominant carrier, Section 61.26 cannot apply to Aureon and neither can Section 51.911(c) which incorporates those nondominant carrier rate regulations.

In 1980, in its *Competitive Carrier First Report and Order*, the Commission established the dominant/non-dominant regulatory regime for Title II rate and entry regulation.[9] In a series of orders, the Commission distinguished between carriers with market power (dominant carriers) and those without market power (non-dominant carriers).[10] The FCC has applied standard principles of antitrust analysis to determine whether a carrier possesses market power in the provision of the relevant service in the relevant geographic market.[11] Dominant carriers are those carriers found by the Commission to have market power,[12] and non-dominant carriers are those not found to be dominant.[13] The FCC must perform a market power analysis to determine whether a dominant carrier should be reclassified as non-dominant for a particular service or market.[14] In the *Liability Order*, the FCC explicitly stated that there had been no finding of non-

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[8] AT&T Opp. at 11.

[9] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1 (1980) ("*Competitive Carrier First Report and Order*")).

[10] *In re NYNEX Long Distance Co.*, 11 FCC Rcd. 8685, 8688 (1996) (citations omitted).

[11] *Id.*

[12] 47 C.F.R. § 61.3(q).

[13] *Id*. § 61.3(z).

[14] *See, e.g., In re Technology Transitions*, Declaratory Ruling, Second Report and Order, and Order on Recon., 31 FCC Rcd. 8283, 8291 (2016) ("*Technology Transitions Second R&O*") (market power analysis performed to determine that ILECs should be classified as non-dominant for interstate switched access service); *Petitions of US West Communications et al. for Forbearance from Regulation as a Dominant Carrier*, Memorandum Opinion and Order 14 FCC

dominance for CEA providers, and "there was no basis on which the Commission could find that CEA providers lacked market power."[15] Nonetheless, the Commission ruled that non-dominant CLEC rate cap and rate parity regulations had applied to Aureon in the past, even though Aureon was, and still is, a dominant carrier for access service in Iowa.

Before the FCC issued its November 8, 2017 *Liability Order*, no carrier had been regulated by the FCC as both a dominant carrier and a non-dominant carrier for the same market, which in this case, is CEA service. It has always been the case prior to the *Liability Order* that a dominant carrier could not be a non-dominant CLEC. As noted in the *Liability Order*, the Commission developed the dominant/non-dominant regulatory dichotomy in the *Competitive Carrier First Report and Order*,[16] and the FCC has consistently maintained the different regulatory regimes applicable to the different carrier classifications.[17] The Commission's rules require dominant carriers such as Aureon to file tariffs pursuant to Section 61.38 (contained in the subpart of the rules entitled dominant carriers). Non-dominant carriers are subject to the transitional access service pricing rule in Section 61.26 (contained in the subpart of the rules entitled non-dominant carriers). The CLEC transition rules adopted in the *2011 USF/ICC Transformation Order* did not apply to dominant carriers. As a dominant carrier, Aureon has

Rcd. 19947 (1999) (forbearance from dominant carrier regulation not warranted because the record did not support a conclusion that petitioners lacked market power).

[15] *Liability Order* at ¶ 27.

[16] *Id.* at n.28 (citing *Competitive Carrier First Report and Order*, 85 FCC 2d at 10-11, ¶ 26).

[17] *See, e.g., IP-Enabled Services,* Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, 4889 (2004) ("the Commission has countered the market power exercised by owners of bottleneck facilities by applying differential regulation to carriers that are deemed 'dominant' and 'non-dominant'") (citing *Competitive Carrier First Report and Order*, other citations omitted); *Application of Embarq Corp. d/b/a CenturyLink, Inc. to Discontinue Domestic Telecomms. Servs.*, 29 FCC Rcd. 14374 n.1 (2014) (separate applications filed because affiliates were subject to different regulations, with CenturyTel subject to dominant carrier regulation and Embarq subject to non-dominant carrier regulation).

always calculated its rates on the basis of cost studies under Section 61.38,[18] and not the non-dominant rules applicable to CLECs.

As recently as 2016, the Commission affirmed the decades-long status of centralized equal access ("CEA") service providers as dominant-only when the FCC reclassified incumbent local exchange carriers ("ILECs") as non-dominant. The Commission's confirmation, which specifically cited its 1988 order granting Section 214 authority to Aureon and classifying Aureon as a dominant carrier, could not have been clearer:

> "The scope of this declaratory ruling [classifying ILECs as non-dominant] is limited to interstate switched access services. . . . [N]on-dominant status does not extend to centralized equal access providers because such carriers do not provide service to end users."[19]

The FCC had never before applied non-dominant carrier rate regulations to Aureon until the November 8, 2017 *Liability Order*. AT&T argues that Aureon should have known by the language in the *2011 USC/ICC Transformation Order* that the CLEC transition rules for non-dominant carriers applied to all LECs, including CEA providers such as Aureon. However, that order only applied Section 51.909 to ILECs and Section 51.911 to CLECs (via the Section 51.905(b) reference to those subparts), and when the 2011 order was issued, Aureon was neither an ILEC nor a CLEC.

AT&T's contention that Aureon was a non-dominant LEC covered by the *2011 USF/ICC Transformation Order* is refuted by the 2016 *Technology Transitions Second R&O,* which was issued after the *2011 USF/ICC Transformation Order*. The *Technology Transitions Second*

[18] 47 C.F.R. § 61.38.

[19] *Technology Transitions Second R&O,* 31 FCC Rcd. at 8290 n.43 (emphasis added) (citing *Application of Iowa Network Access Division for Authority Pursuant to Section 214 of the Commun's Act of 1934 and Section 63.01 of the Commission's Rules and Regulations to Lease Transmission Facilities to Provide Access Service to Interexchange Carriers in the State of Iowa*, Memorandum Opinion, Order and Certificate, 3 FCC Rcd. 1468 (1988)).

R&O confirmed Aureon's understanding that CEA providers continued to be regulated only as dominant carriers. It was not until the issuance of the *Liability Order* that the Commission changed the regulatory landscape for CEA service, and regulated Aureon as both a dominant carrier and a non-dominant carrier for purposes of CEA service.

The Due Process Clause of the Fifth Amendment of the U.S. Constitution "limits the Government's authority to retroactively alter the legal consequences of an entity's or a person's past conduct."[20] This means that "[a]n agency cannot enforce a rule against a party if it is unduly vague or if the party did not otherwise have fair notice of the rule."[21] In other words, in order to satisfy the Due Process Clause, agencies must, at a minimum, "provide regulated parties '*fair warning of the conduct [a regulation] prohibits or requires*.'"[22]

The application of both dominant and non-dominant carrier regulations to Aureon's CEA service is a new FCC classification, and this is the only instance in which the Commission has ever determined that the dominant/non-dominant carrier dichotomy should be merged and applied simultaneously to the same market and to a single carrier. The FCC did not provide fair notice in the *2011 USF/ICC Transformation Order*, or any subsequent decisions, that the dominant/non-dominant regulatory regime that had been in place since 1980 would be changed for CEA providers, and therefore, the *Liability Order* and Section 51.905(b) (which refers to the Section 51.911 CLEC rate regulations) cannot be applied retroactively to void Aureon's tariff. To do so would violate Aureon's due process rights by retroactively applying an unprecedented,

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[20] *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 462 (D.C. Cir. 2017). *See also Landgraf v. USI Film Products*, 511 U.S. 244, 265 ("[I]ndividuals should have an opportunity to know what the law is and confirm their conduct accordingly").
[21] *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 360 (D.C. Cir. 2017) (citation omitted).
[22] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (emphasis added, alterations in original) (quoting *Gates and Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

unconventional, and odd new regulatory regime so as to require retroactive refunds that deprive Aureon of its property.

II. GIVEN THE ABSENCE OF COMMISSION FORBEARANCE APPLICABLE TO DOMINANT CARRIERS, THE COMMISSION MUST ENFORCE SECTION 204(A)(3) AND CANNOT RETROACTIVELY VOID AUREON'S DOMINANT CARRIER TARIFF MADE LAWFUL BY SECTION 204(A)(3).

The Commission has a duty to give full force and effect to Aureon's 2013 tariff rate, made lawful by 47 U.S.C. §204(a)(3), because the Commission has never exercised its authority to forbear from enforcing that statutory provision for CEA service or dominant carrier tariffs. 47 U.S.C. § 160 requires the Commission to find that three statutory conditions are satisfied before forbearing from applying the tariff requirements in the Communications Act. The Commission has only exercised such forbearance from its tariff rules for non-dominant carriers. "[W]e exercise our statutory authority to forbear from the enforcement of our tariff rules and the Act's tariff requirements for CLEC access services."[23] By contrast, rather than forbearance, the *Liability Order* required Aureon to continue to comply with the tariff rules, including the requirement to file cost studies.[24]

When the Commission permitted Aureon's 2013 tariff rate to become effective on July 2, 2013 without taking any action, the 2013 tariff rate was established by law (i.e. Section 204(a)(3)) as the only lawful rate.[25] Section 204(a)(3) states in pertinent part that a tariff rate "shall be deemed lawful and shall be effective…15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action…before

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[23] *In the Matter of Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, 9956, ¶ 82 (2001) ("*CLEC Access Reform Order").*

[24] *Liability Order* at ¶ 35.

[25] Furthermore, because dominant carriers like Aureon remain subject to 47 U.S.C. § 203(c), "the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext." *AT&T v. Central Office Telephone, Inc*., 524 U.S. 214, 222 (1998).

the end…of that 15-day period." The 2013 lawful rate established by federal statute, and which Aureon was bound to charge under compulsion of statute, cannot be taken from Aureon because it is subsequently determined to be excessive. No such power is vested in the Commission. By retroactively condemning as unlawful, the 2013 rate previously established by statute as lawful, the *Liability Order* amounts to a taking of Aureon's property without due process of law, a procedure prohibited by the Fifth Amendment. Therefore, the *Liability Order* infringes upon Aureon's constitutional rights, is contrary to the Communications Act and the Administrative Procedure Act, and violates generally established notions of justice.

Court decisions uniformly confirm that dominant carrier rates filed pursuant to Section 204(a)(3) are not subject to retroactive refunds, even though they are later found to violate regulatory requirements adopted by the Commission.[26] A dominant carrier's deemed lawful rate that violates the Commission's prescription of a maximum rate of return is not subject to retroactive refunds. *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 670 (D.C. Cir. 2006) ("tariffs 'deemed lawful' under § 204(a)(3) immunized rate of return carriers from damages liability"); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002) ("'deemed lawful' tariffs are not subject to refunds"). So also, a dominant carrier's deemed lawful rate that exceeds a Commission rate cap cannot be subject to retroactive refunds.

The case law is clear that the Commission cannot void *ab initio* the lawful rate established by 47 U.S.C. §204(a)(3) when the Commission, as here, has not previously exercised its authority to forbear from the enforcement of Sections 203 and 204 of the Act.[27] Furthermore, the Commission has consistently and staunchly maintained for many years that Section 204(a)(3)

[26] Aureon Pet. at 21-22.
[27] *Id*. at 15-17.

authorizes the Commission to only make prospective determinations concerning the lawfulness of a dominant carrier's tariff. AT&T does not contest that dominant carriers like Aureon are fully subject to the tariff requirements of Sections 203 and 204 and that the Commission has never extended forbearance to dominant carrier tariffs. Therefore, the Commission should reconsider its decision to retroactively void Aureon's 2013 tariff rate because Aureon's 2013 dominant carrier tariff rate was not subject to forbearance from 47 U.S.C. §§ 203(c) and 204(a)(3), and could not be voided by the Commission retroactively.

III. THE CLEC RATE BENCHMARK SHOULD BE THE FLOOR FOR AUREON'S CEA RATE, RATHER THAN A CAP.

Aureon requests reconsideration of the Commission's decision in paragraph 24 of the *Liability Order* stating that Aureon's tariff rate is unlawful if it exceeds the Section 51.911(c) CLEC rate benchmark.[28] The FCC stated in the *Liability Order* that the rate cap and rate parity rules for non-dominant carriers, and Section 61.38 requiring dominant carriers to file cost studies, complement each other.[29] However, that is only true if the Section 51.911(c) CLEC rate benchmark acts as a floor for Aureon's CEA rate, rather than a cap. When the Commission established rate benchmarking for CLECs, the FCC stated that a CLEC's access rates would be conclusively presumed to be just and reasonable if the rates were at or below the benchmark.[30] As a CLEC, there would be no need for Aureon to perform cost studies to support its rates at or below the CLEC rate benchmark because CLEC rates at or below that level are, by FCC rule, presumed just and reasonable.

The only meaningful way for both the Section 51.911(c) CLEC rate rule and Section 61.38 dominant carrier rate rule to complement each other is if the CLEC rate benchmark is a

[28] *Liability Order* at ¶ 24.
[29] *Id.* at ¶ 26.
[30] *CLEC Access Reform Order*, 16 FCC Rcd. at 9938-39, ¶¶ 40-41.

floor for Aureon's CEA rate, rather than a ceiling. Section 61.38 requires Aureon to file cost studies to exceed the Section 51.911(c) CLEC rate benchmark. "A basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost." *MCI Telecomm. Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982). The CLEC Section 51.905(b) default transitional rate of $0.00819, as specified by Section 51.911(a), would continue to operate as the ceiling for Aureon's CEA rate according to the *Liability Order*.

IV. CONCLUSION.

For the reasons set forth above, and in furtherance of the Commission's very important 5th Amendment duty to ensure that unlawful, arbitrary government action does not deprive any American of private property without due process, the Commission should grant Aureon's Petition for Reconsideration and hold that the *Liability Order* applies the CLEC rate rules to Aureon only prospectively. Specifically, the Commission should apply only prospectively the CLEC default transitional rate cap of $0.00819 (as defined by Section 51.911(a), which Section 51.905(b) incorporates by reference). The Commission should also only apply prospectively the Section 51.911(c) CLEC rate benchmark as a rate floor, above which Aureon can charge higher rates that are supported by Section 61.38 cost studies.

Respectfully submitted,

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Dated: March 29, 2018

CERTIFICATE OF SERVICE

I, Monica Gibson-Moore, do hereby certify that on this 29th day of March 2018, copies of the foregoing Reply of Iowa Network Services, Inc. d/b/a Aureon Network Services were sent to the following:

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